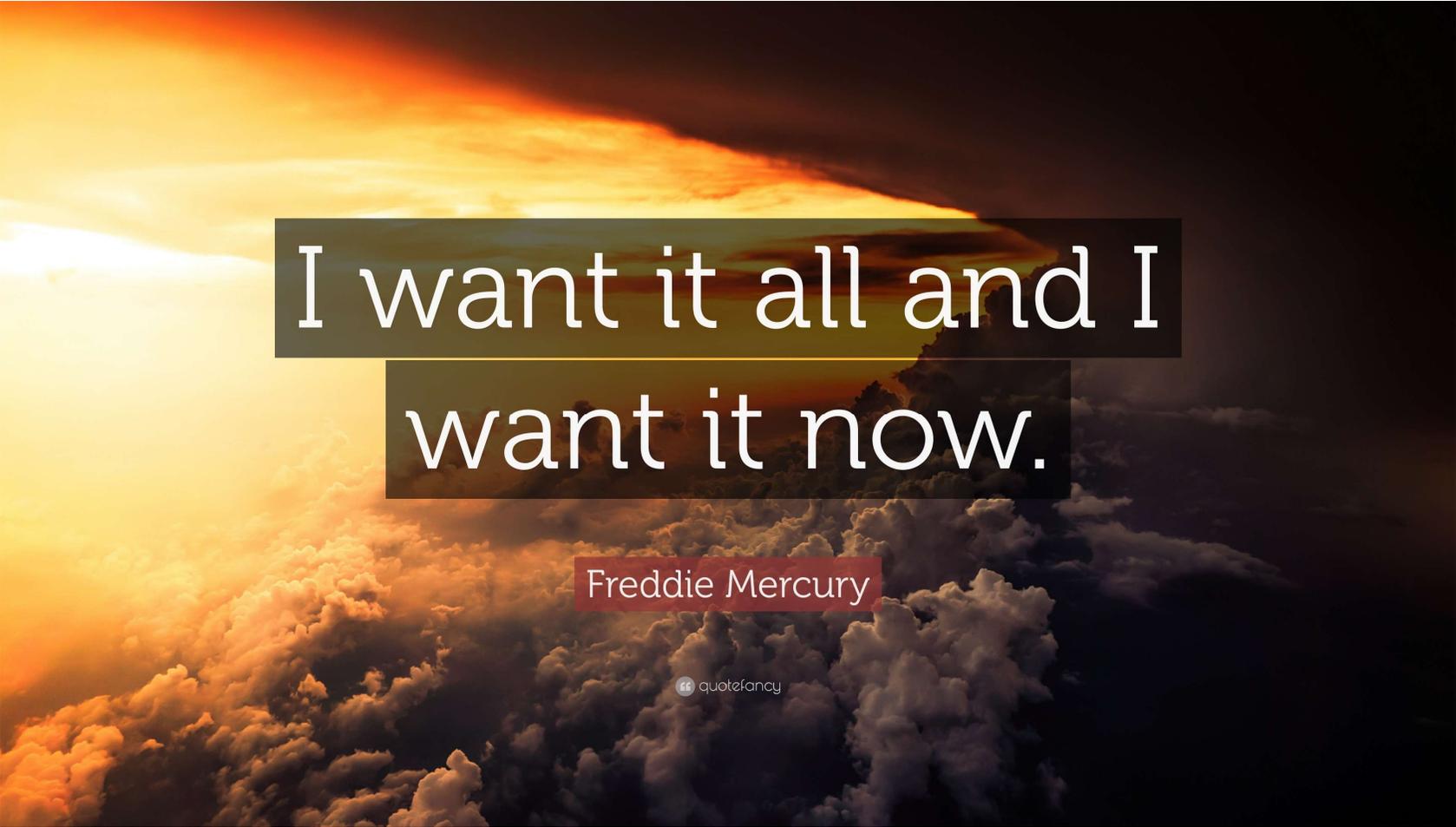


Finding Part 36 angles

How far can you push the court on Part 36 offers and their consequences for costs, including 90/10 offers, suspension of interest, and out-of-time offers?

P.J.KIRBY KC

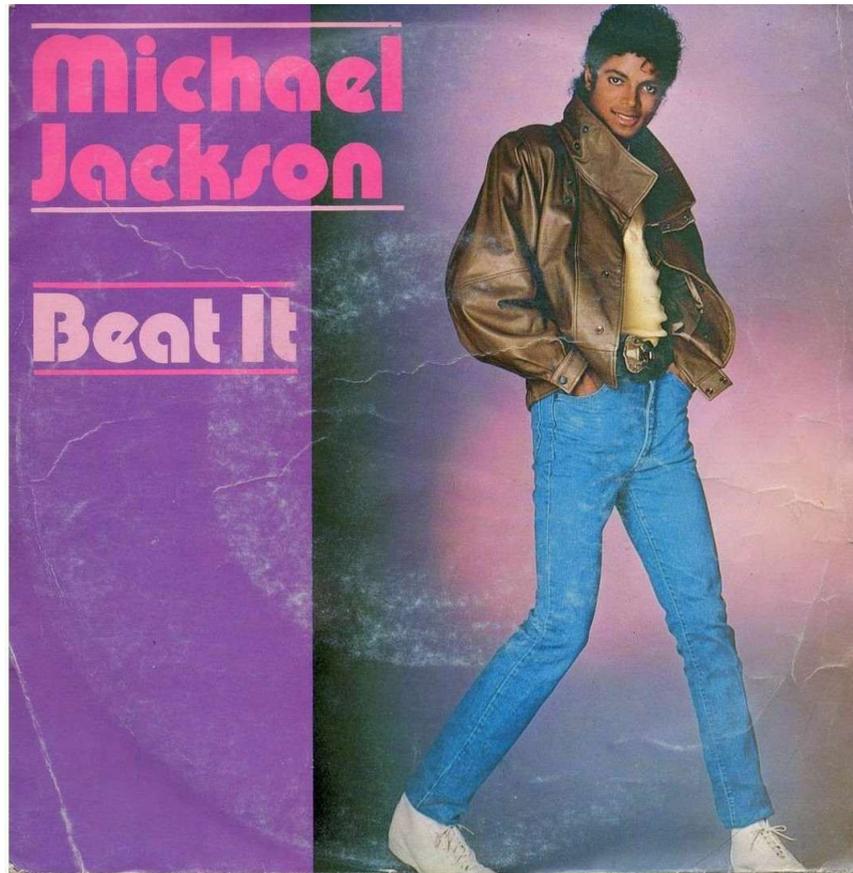
12 March 2025



I want it all and I
want it now.

Freddie Mercury

 quotzfancy



What do they keep on telling us?

- Scope of this Part
- 36.1
- (1) This Part contains a self-contained procedural code about offers to settle made pursuant to the procedure set out in this Part (“Part 36 offers”).

When was the offer made?

- When does the trial start?
- *Mate v Mate*[2023] EWHC 806 - October 2021, the court sent a document to the parties entitled "Notice of Trial Date" with dates for the trial. 5 September 2022 was a judicial reading day.
- Judge found that the trial started on the day all parties were required by the notice to attend court – 6 September – result was Part 36 offer had been served in time
- Don't forget if served after 4pm deemed served next day



Call that an offer?

- *Shah v Shah* [2021] EWHC 1668 (QB) six months before trial, the claimants made a Part 36 offer to settle for the nominal sum of £1 plus payment of costs. At trial, claimants awarded £10. Judge found that as a matter of substance and reality, the claimants had won. The case had been factually distinct from cases where a defeat on quantum meant an overall lack of success.
- *Leonard v Leonard* [2024] EWHC 979 (Ch) – contentious probate case – Cs’ Part 36 offer genuine - made at an early enough stage of the proceedings to result in significant costs savings and had a meaningful impact on the changes of avoiding a trial.

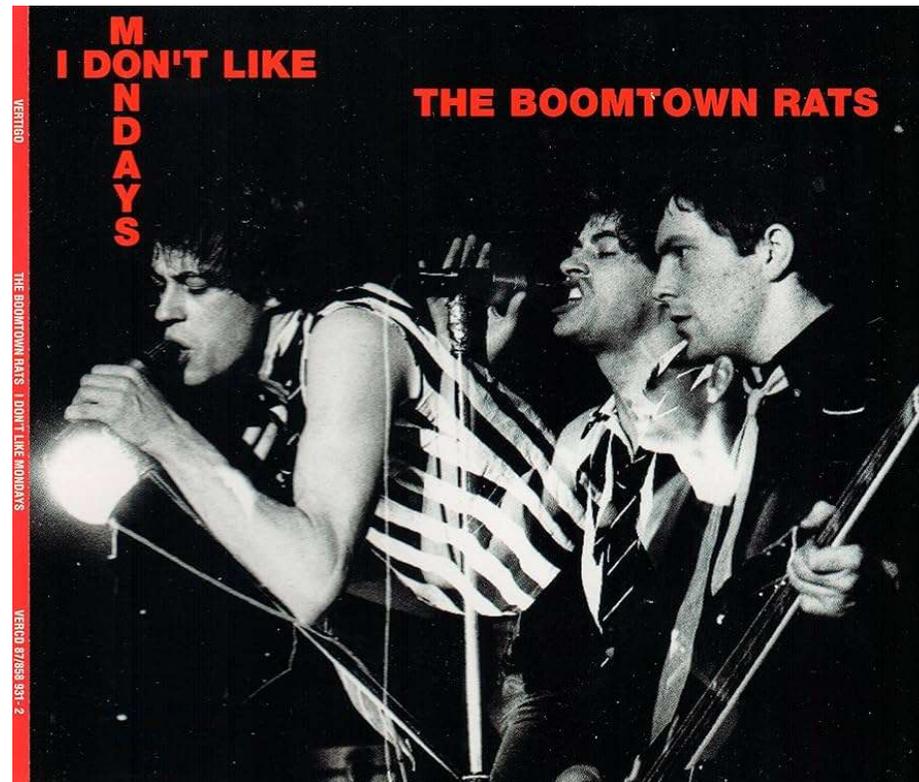
So where are we with

90/10 offers?

Mundy v TUI [2023] EWHC 385 (Ch)

- C's Part 36 offer - liability only - 90/10 – holiday sickness claim
- D's Part 36 Offer settle £4,000
- Offer was "contrary to the letter and the spirit" of Part 36.
- The court also found that the offer was not an offer to settle the claim, but rather an attempt to cover the claimant with an insurance policy.

But what if



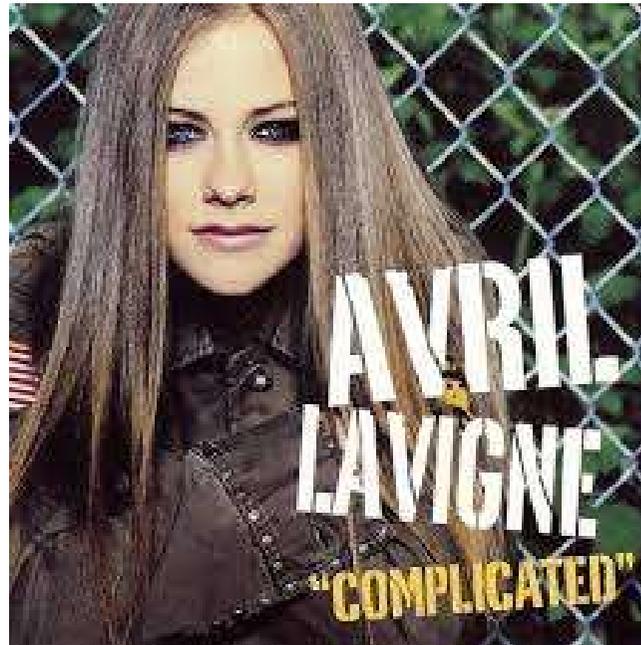
Chapman v Mid & South Essex NHS Foundation Trust [2023] EWHC 1871 (KB)

- C Pt 36 offer – 90% of damages assessed on 100% liability basis
- Mundy v TUI not applicable here. Whereas in Mundy both liability and monetary offers had been made, here only substantive offer made by either party had been C's 90/10 liability split offer.
- “ While Collins Rice J did discuss 90/10 liability offers in general terms at [36]–[42], I do not understand her judgment as purporting to hold that Part 36 consequences cannot flow from such offers made in different factual circumstances from those before her, and any such finding would be obiter in any event. “

Part 36 offers and Fixed Recoverable Costs

- The “new” Intermediate Track
- Fixed costs plus additional fixed costs – CPR 36.23
- Instead of indemnity costs fixed costs plus additional costs being an amount equivalent to 35% of the difference between the fixed costs for—
 - (a) the stage applicable when the relevant period expires; and
 - (b) the stage applicable at the date of judgment,
- to which the claimant is entitled under paragraph (3)(a) and (b).

As the song says ... (why did you have to go and make things so complicated?)



Consequences of liability only Part 36 offers?

- Costs , enhanced interest on costs but anything more?
- JMX v Norfolk & Norwich Hospitals NHS Foundation Trust (No.2) [2018] EWHC 675 (QB) – Foxton J
- “ the claimant has an effective Part 36 offer on liability “in the bag” and he is prima facie entitled to the additional relief set out in rule 36.17(4) . That is apparent from the Ruling on Costs and indeed this Ruling. If his advisers wish that to be recorded in the order giving effect to those two Rulings, so be it, but no order for an “additional sum”, whether under rule 36.17(4)(d)(i) or (ii) , will be made until “all issues in the case have been determined”. If the claim for damages is settled in due course, it will be open to the claimant, in default of agreement as to the consequences, to restore to the court the issue of the payment of any “additional sum” arising from the Part 36 offer on liability.”

Can a liability Part 36 offer result in additional sums with reference to quantum?



Part 36 offers and interest

- Part 36 offers will be treated as being inclusive of interest – 36.5(4)
- Remember to provide for the accrual of further interest after the period for acceptance expires – 36.5(5)

Can a Part 36 offer be made exclusive of interest?

- King v City of London Corp [2019]EWCA Civ 2266
- It was not possible to make a valid Part 36 offer exclusive of interest, either generally or in the context of detailed assessment proceedings. A Part 36 offer had to be inclusive of interest. CPR r.36.5(4) was not capable of turning an offer specifically expressed to be exclusive of interest into one including interest.

What is the rate of interest payable under CPR 36.17?

- Remember 10% above base is the maximum not the starting point
- If paying look for 4-6% above base

Part 36 offers and detailed assessments

- Part 36 offers in respect of the costs that are being assessed are a very useful tactic to deploy – the offer must include interest
- Part 36 offers cannot however be made in respect of the costs of the detailed assessment proceedings - *Best v Luton and Dunstable Hospital NHS Foundation Trust* [2021] EWHC B2 (Costs)

Part 36 offers and Solicitors Act assessments

- Part 36 does not apply to solicitor/client costs assessments under section 70 of the Solicitors Act 1974 - *Zuhri v Vardags Ltd* [2023] EWHC 3050 (SCCO) – CJ Leonard
- A purported part 36 offer or indeed any form of offer could be relevant to showing “special circumstances” if seeking to depart from the “one-fifth rule”
- Part 36 will apply to a common law assessment of a solicitor’s bill – *SZ Solicitors v Bharj* [2024] 8 WLUK 65

Time for recycling



Get it right the first time – a common theme



Thank you!

Any questions?

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@kirby_pj (but given it up for Lent!)